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No. 94-766

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

EUGENE H. DUFFY, *et al.*,
Petitioners,

v.

JAMES W. WETZLER, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of New York Appellate Division—Second Judicial Department

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REASONS FOR GRANTING THE WRIT	1
I. THE DECISION BELOW FLOUTS THE MANDATE OF THE COURT IN *DUFFY I*	1
II. AS IN *REICH*, RESPONDENTS HAVE ENGAGED IN A "BAIT AND SWITCH" AND PETITIONERS HAVE BEEN DENIED THE MEANINGFUL, BACKWARD-LOOKING RELIEF REQUIRED BY THE CONSTITUTION	3
CONCLUSION	10

TABLE OF AUTHORITIES

CASES — Page

Atchison, T. & S.F.R. Co. v. O'Connor, 223 U.S. 280 (1912) 1
Boeing Co. v. Van Gemert, 444 U.S. 472 (1980) 10
Brinkerhoff-Faris Trust and Savings Co. v. Hill, 281 U.S. 673 (1930) 5
Collins v. City of Harker Heights, 112 S. Ct. 1061 (1992) 2
Collins v. Waldron, 259 Ga. 582, 385 S.E.2d 74 (1989) 4
In re Crispo, WESTLAW: 1994 WL 268092 (N.Y. Div. Tax App.) 8
Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980) 9
Elder v. Holloway, 114 S. Ct. 1019 (1994) 2
Felder v. Casey, 487 U.S. 131 (1988) 6
Hafer v. Melo, 502 U.S. 21 (1991) 2, 6
Hardwick v. Cuomo, 891 F.2d 1097 (3d Cir. 1989) 4
Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510 (1993) 1, 2, 7
Howlett v. Rose, 496 U.S. 356, *on remand*, 571 So. 2d 29 (Fla. 1990) 2
McKesson Corp. v. Florida Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990) 2
NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) 3
Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 7
Radio Common Carriers of N.Y., Inc. v. State of N.Y., 601 N.Y.S.2d 513 (Sup. Ct. N.Y. County 1993) 6
Reich v. Collins, —— U.S. —— (December 6, 1994) ..... *passim*
Matter of Ruszowski, WESTLAW: 1991 WL 338502 (N.Y. Div. Tax App.) 9
Matter of Tompkins, 1987 N.Y. Tax Lexis 1033 (State Tax Commission 1987) 9
Waldron v. Collins, 788 F.2d 736, *cert. denied*, 479 U.S. 884 (1986) 4
Matter of Zimmet [1968-1971 Transfer Binder—New Matters] N.Y. Tax Rep. ¶ 99-188 (CCH) (State Tax Commission 1968) 8

TABLE OF AUTHORITIES—Continued

STATUTES	Page
42 U.S.C. § 1983	*passim*
New York Judiciary Law § 475	10
New York Tax Law. § 687 (a)	7
New York Tax Law. § 697 (d)	8
MISCELLANEOUS	
Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128 (1986)	6

PETITIONERS' REPLY BRIEF

The petitioners respectfully submit this Reply Brief in response to the Briefs in Opposition filed by respondents. In light of this Court's decision in *Reich v. Collins*, —— U.S. ——, No. 93-908 (December 6, 1994), petitioners request that their petition for a writ of certiorari be granted.

REASONS FOR GRANTING THE WRIT

This Court has made abundantly clear, as it just held in *Reich*, slip op. at 1, that a "clear and certain" remedy is required here to satisfy due process:

> In a long line of cases, this Court has established that due process requires a "clear and certain" remedy for taxes collected in violation of federal law. *Atchison, T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280, 285 (1912) (Holmes, J.).

New York, however, did not provide a "clear and certain" remedy. Although it initially led taxpayers to believe that, as the New York Tax Law apparently states, they had a postdeprivation refund right, New York subsequently claimed that right did not exist, just as Georgia did in *Reich*. Again, as in Georgia, the "bait and switch" was on. As a result, approximately 20,000 of the 30,000 taxpayers entitled to relief have received nothing and will receive nothing absent further court action.

I. THE DECISION BELOW FLOUTS THE MANDATE OF THE COURT IN *DUFFY I*

Respondents claim that the Second Department did not flout the mandate of the Court in *Duffy I* because it was not required to reexamine all of the holdings in its prior decision. Respondents contend that the Court's mandate required *only* further consideration by the Second Department "in light of *Harper*" [1], and that *Harper* did not specifically address the remaining issues raised by this petition, including a § 1983 damages cause of action, class certification or attorneys' fees. The respondents'

[1] *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993).

assertion is "entirely beside the point". *Reich*, slip op. at 4. As *Reich* makes clear, when a case is remanded for further consideration in light of another decision, the court below may not ignore cases relied on therein or "the long line of cases upon which" the holding depends. *Id.* at 3.

Indeed, respondents' latest reading of *Harper* is both incomprehensible and untenable. They state:

> Thus, the [Second Department] on remittitur for further consideration in light of *Harper* was required to consider the issues of remedy and the adequacy under the Due Process Clause of the State's predeprivation procedures if the refunds could be denied under State law.

(State's Brief at 14). Neither *Harper* nor any holding of the Court can reasonably be read to so state. Rather, due process simply requires a "clear and certain remedy". As this Court just made explicit in *Reich*, the remedy can be a predeprivation one, a postdeprivation one or a hybrid. The remedy can be changed over time.

The Second Department was, however, required to examine the entire remedy available in New York, test it against the requirements of due process and, unless there was a "clear and certain" remedy available, fashion "meaningful backward-looking relief." *Harper*, 509 U.S. at ——, quoting *McKesson Corp. v. Florida Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31 (1990). The Second Department's failure to do so was a failure to reexamine its decision "in light of *Harper*". *Harper* requires no less. The mandate requires just that.[2]

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[2] Respondents' further argument that the mandate did not refer to the Court's holdings in *Hafer v. Melo*, 502 U.S. 21 (1991), *Howlett v. Rose*, 496 U.S. 356, *on remand*, 571 So.2d 29 (Fla. 1990), *Collins v. City of Harker Heights*, 112 S. Ct. 1061 (1992) and, therefore, these subsequent holdings need not be considered in the Second Department's reexamination of its decision is equally frivolous. Indeed, the Court made clear in *Elder v. Holloway*, 114 S. Ct. 1019 (1994), that an appellate court must consider all relevant precedents whether or not considered by the court of first instance.

The Second Department failed to follow the mandate. Instead, it permitted the very "bait and switch" condemned by this Court in *Reich*. In an unheard of "procedure", without receiving briefs by the parties on the effect of the State's unilateral determination to pay certain refunds, without a motion by the State relating to the remaining issues on appeal, despite a scheduled argument date on petitioners' motion for emergent relief which they had been granted on a temporary basis, and without advising the parties as to whether or not there would be oral argument on the appeal on remand, out of the blue, with no prior notice, the Second Department took note of an extrajudicial event described to it in a letter and rendered its decision. Due process? Following the mandate in *Duffy I*? As this Court made clear in *Reich* and in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), absolutely not.

II. AS IN *REICH*, RESPONDENTS HAVE ENGAGED IN A "BAIT AND SWITCH" AND PETITIONERS HAVE BEEN DENIED THE MEANINGFUL, BACKWARD-LOOKING RELIEF REQUIRED BY THE CONSTITUTION

Respondents effectively admit that there was no "clear and certain" remedy in New York. In addressing petitioners' "top ten" list of contradictory representations made by respondents concerning the remedy available (Pet. at 10-11), the City respondents state in part:

> To the extent these statements are varied and seemingly contradictory, they merely reflect the state of flux in which the law existed regarding the issues of refunds . . .

(City Brief at 12). To be clear and certain, there can be no *state of flux*. Respondents may not create a state of confusion, have taxpayers rely on those varying statements and then select from the remedial scheme one aspect of permitted relief and assert that it is the sole remedy available, to the detriment of those who pursued relief which otherwise also appeared to be available.

Due process demands more. In this case, as in *Reich*, it requires "meaningful backward-looking" relief. The partial refund paid by New York to some but not all taxpayers for some but not all tax years within the statute of limitations is inadequate as a matter of law.

As detailed in the petition and below, New York has done exactly what this Court held in *Reich* that states may not do:

> [H]old out what plainly appears to be a "clear and certain" postdeprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists.

Id., slip op. at 1.

As in Georgia, in New York, prior to this *Davis*-related case, it appeared that there was a "clear and certain" right to a postdeprivation refund. *See, e.g.*, Pet. App. G at 47a. New York relied on that apparent "clear and certain" right to a refund in successfully opposing petitioners' motion for a preliminary injunction at the commencement of this case. (R. 199, 200, 314, 316). Georgia had a similar experience in avoiding injunctive relief.[3] New York represented to the Third Circuit in *Hardwick v. Cuomo*, 891 F.2d 1097, 1105 (3d Cir. 1989), that New York taxpayers are entitled to refunds of unconstitutional taxes.[4] Again, there was a parallel in Georgia.[5]

Notwithstanding this "clear" vision of a "certain" refund right, in New York, as in Georgia, the rules changed

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[3] *Cf. Collins v. Waldron*, 259 Ga. 582, 583, 385 S.E.2d 74, 75 n.1 (1989) (dissolving injunction and holding that Georgia's refund statute provided federal retirees an adequate remedy at law).

[4] There, New York's Attorney General represented that:

> '[There is] not . . . a single case in which New York State refused to refund monies collected pursuant to a provision of the Tax Law or, specifically, the personal income tax provisions of Article 22, later declared unconstitutional.'

[5] *See Waldron v. Collins*, 788 F.2d 736, 738, *cert. denied*, 479 U.S. 884 (1986) (reaching a similar conclusion with respect to Georgia's statutory law at issue in *Reich, supra*).

once this *Davis*-related case was commenced. The "bait and switch" was on. As set forth in the petition, New York denied every aspect of the remedy sought claiming, as expediency would serve it, either that another aspect of the remedial scheme should have been sought or was exclusive or that no remedy was available despite what the statutes say and despite how taxpayers had been misled by those statutes and by the State's pronouncements to the taxpayers. Indeed, respondents went so far as to announce that the Legislature had repealed or "delimited" the refund right; the same right they now claim was "clear and certain" and should be exclusive.[6] As in *Reich*, "what [New York] did here, is to reconfigure its scheme, unfairly, in mid-course." *Reich*, slip op., at 4. Due process does not permit this course of conduct. *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U.S. 673 (1930).

This case seeks remedies for the indisputable violations of the federal rights of the putative class. This Court has consistently held that where, as here and in *Reich*, the state did not provide a "clear and certain" remedy, the Constitution requires remedies which provide "meaningful, backward-looking relief". *Reich*, slip op. at 7. In this case, *inter alia*, a § 1983 damages claim, class certification and the right to common fund or class action counsel fees are necessary in order to provide such relief and are not deniable under State law in contravention of petitioners' federal rights.

The respondents' assertions concerning the failure of the Second Department to reexamine the § 1983 damages claims are disingenuous.[7] The respondents were directly

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[6] Respondent Wetzler asserted this position as early as July 21, 1989, well before the statute of limitations had run within which to bring refund claims. *See* Brief of State of New York Defendants-Appellants, to the Second Department, October 25, 1990.

[7] The briefs in opposition are rife with assertions, distortions and misrepresentations not supported by the record. For example,

involved in the violations of petitioners' federal rights. *See, e.g.*, R. 442-43, 521-30. In addition, the respondents defended the individual capacity claims on the very basis rejected by the Court in *Hafer v. Melo*, 502 U.S. 21 (1991). *See* State Defendants' Memorandum of Law in Support of Motion for Summary Judgment, January 17, 1990 at 13. Had the Second Department reconsidered its decision in accordance with the Court's mandate in *Duffy I*, it would have been obligated to reverse itself. *Hafer v. Melo*, 502 U.S. 21 (1991). The Second Department's failure to do so underscores the *novelty* with which this case was disposed of upon remand from this Court. For example, in cases other than this, there is no question but that Respondent Wetzler is amenable in New York courts to claims under § 1983. *See Radio Common Carriers of N.Y., Inc. v. State of N.Y.*, 601 N.Y.S.2d 513 (Sup.Ct. N.Y. County 1993).

Similarly unpersuasive are the respondents' efforts to avoid the federal questions presented by the Second Department's refusal to reexamine class certification.[8] Upon remand from this Court, the Second Department had "a constitutional duty 'to proceed in such manner that all the substantial rights of the parties under controlling federal law were protected.' " *Felder v. Casey*, 487 U.S. 131, 151 (1988) (citations omitted). The breach of this duty by the Second Department conditioned the right to bring a § 1983 class suit "against the very persons and entities Congress intended to subject to liability." *Id.* at 144-45.

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it is asserted that no prospective relief was obtained under § 1983. State Brief at 15. This is false. It was as the result of this lawsuit that New York's scheme was remedied for years 1989 and after. (R. 187, R2. 130). Respondents have also been permanently enjoined under § 1983 from enforcing the scheme against all federal retirees from whom a liability was claimed for the years prior to 1989. Pet. App. A at 3a.

[8] The respondents' position highlights the "threat to federal rights posed by the [aberrant] view that the procedures followed in state court litigation of federal questions are issues of state law." Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128, 1136 (1986).

It is indisputably an important federal question warranting review by this Court. *Id. See also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("[M]ost of the plaintiffs would have no realistic day in court if a class action were not available.")

Absent class certification as part of the relief provided in this case,[9] most of those who should receive relief will get none. The State will benefit by having confused taxpayers as to what they could do or had to do to be made whole. The premise of respondents' position and the ruling of the court below denying class certification is that denial is appropriate where governmental operations are involved and future plaintiffs will be protected by *stare decisis.*

No such protection occurred here. We are now in our sixth year of litigating this case. The statute of limitations for requests for refunds and for § 1983 claims is less than that. *See, e.g.*, New York Tax Law § 687(a). By the time this case is concluded, respondents will argue that no further claims may be brought.[10] That result may be "meaningful", but not in a way that those who are supposed to receive relief would have expected.

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[9] Respondents suggest that because Virginia, the State at issue in *Harper*, unlike New York, does not provide for class certification, that due process cannot require class certification in this case. That argument is meritless. It is axiomatic that the remedies provided on a State by State basis may differ and yet all be consistent with due process. Here, however, New York law provides for class actions and the decision below was erroneous in its failure to grant class certification. As set forth in the petition (pp. 18-19) even if class certification could, in some instances under State law, properly be denied, those holdings may not serve to foreclose the § 1983 federal damages remedy sought in this case.

[10] The State respondents suggest that "the issue whether the class action mechanism can be used to toll the statute of limitations is not properly before this Court because petitioners have waived that issue." (State Brief at 21). The State respondents are wrong. Their position, however, underscores the importance of reversing the denial of class certification as sought in this petition.

States should not be rewarded for delay, obfuscation and misrepresentation as has occurred here. To be "meaningful", to be "backward-looking", the relief awarded should include class certification so that those whose rights were violated receive notice and an opportunity to be heard; an opportunity for relief.

Respondents have paid refunds only to those who guessed right and personally filed for refunds and only for the year or years for which filed. In addition to bringing this lawsuit, petitioner Duffy filed a refund claim on behalf of the entire class aggrieved in this case. (R. 514, R2. 639). This notice should have been sufficient under New York Law to provide refunds to all aggrieved. Under New York law, until the respondents extra-judicial act in this case, notice to the State was adequate where the facts of the taxpayer's claim were provided by another similarly situated taxpayer. *In re Crispo*, WESTLAW: 1994 WL 268092 (N.Y. Div. Tax App.), at 2-3. In this case, however, respondents have refused to recognize petitioner's filing as protecting the rights of others. The relief sought by this petition would achieve that protection by class certification or otherwise.

The Second Department did not, however, even reconsider class certification or other alternatives in fashioning the appropriate remedy here. It simply swallowed the "bait" and accepted the "switch". New York's sleight of hand also failed to reveal an alternative method pursuant to which "meaningful backward-looking relief" should have been provided. Pursuant to New York Tax Law § 697(d), the State should have refunded these illegal exactions to all who were aggrieved without regard to the statute of limitations.[11] *See* App. A at a-1. By the failure

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[11] Case law establishes that a refund claim for the erroneous payment of New York tax on a pension exempt from New York tax is not subject to the period of limitations under Section 687 but is instead governed by the special refund provisions of Section 697(d). *See Matter of Zimmet* [1968-1971 Transfer Binder—New Matters] N.Y. Tax Rep. ¶ 99-188 (CCH) (State Tax Commission 1968) (refunding taxes on erroneously included New York City

to consider these issues below, petitioners and the putative class were denied due process.

Similarly, an award of common fund or class action attorneys' fees and costs is both part of the remedy and vital to protect the due process rights of petitioners and future plaintiffs seeking to challenge actions in violation of federal law. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980). Again, the Second Department failed to even reexamine this issue. Due process required that reexamination. Respondents' arguments concerning their views of an ultimate entitlement to an award, therefore, miss the mark.

Moreover, respondents should be embarrassed and ashamed of the positions to which they have stooped on this issue, including their argument that the taxpayers who have received relief did not benefit from the efforts of the attorneys' herein.[12] *See* State Brief at 22. Absent the effort by petitioners and their counsel, there would have been no relief in New York. Absent an ability for counsel here and in future cases to obtain a fee, there will be no more challenges by individual taxpayers of exactions contrary to federal law, except by the wealthy.[13] Due process

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pension); *Matter of Tompkins*, 1987 N.Y. Tax Lexis 1033 (State Tax Commission 1987) (refunding taxes on erroneously included New York State pension). Moreover, there is no requirement that a taxpayer explicitly invoke relief under section 697(d) to pursue the statutory entitlement to a refund thereunder. *See Matter of Ruszowski*, WESTLAW: 1991 WL 338502 (N.Y. Div. Tax App.) at 6.

[12] Here, too, is another example of the unabating conflicting positions taken by respondents. Previously, respondents have pronounced that all claims were subject to the results in this case. *See, e.g.*, Notice of New York State Department of Taxation and Finance dated August 31, 1993.

[13] Respondents' argument that the fact that counsel here have also been retained by approximately 650 taxpayers (325 couples) in a related action evidences that common fund or class action attorneys' fees are not necessary to provide an incentive to bringing such claims is, again, wrong. In view of the modest size of the average claim, such representation is not economically viable and these law firms would not do it again.

requires that the remedies available to encourage such claims be part of the "meaningful" relief afforded in this case.[14]

Respondents' concern here is purely selfish, not paternalistic. They know that, absent a *fee-sharing* ability, these claims cannot, as a practical matter, be brought. That self-interest is why the law is clear that they have no standing regarding this issue. *Boeing Co. v. Van Gemert,* 444 U.S. 472 (1980).

The policy issues here are vitally important. Respondents refer to "the good policy promoted by denying class certification and common fund attorneys' fees". City Brief at 23-24. Not surprisingly, they do not identify this policy. "Good" is also a curious way to describe such policy which results in gross injustice in this case and judicially approved injustice in the future. Due process is a better policy.

CONCLUSION

For the foregoing reasons, those set forth in the Brief *Amici Curiae* of the National Association of Retired Federal Employees, *et al.* in Support of Petitioners, as well as those previously set forth, the petition for a writ of certiorari to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, should be granted.

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[14] The issue of a class action or common fund fee award is not an issue of "fee-shifting" as respondents suggest. *See* State Brief at 22, City Brief at 23. These awards come from those who receive relief, not from a further assessment against the wrongdoer. In this case, however, by paying the entire amount of refunds it chose to make to certain taxpayers, under New York's attorney lien law (Judiciary Law § 475), respondents are themselves liable for such fees.

Respectfully submitted,

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APPENDIX

APPENDIX

EXCERPTS OF RELEVANT NEW YORK LAW

§ 697. General powers of tax commission

(d) Special refund authority.—Where no questions of fact or law are involved and it appears from the records of the tax commission that any moneys have been erroneously or illegally collected from any taxpayer or other person, or paid by such taxpayer or other person under a mistake of facts, pursuant to the provisions of this article, the tax commission at any time, without regard to any period of limitations, shall have the power, upon making a record of its reasons therefore in writing, to cause such moneys so paid and being erroneously and illegally held to be refunded and to issue therefor its certificate to the comptroller.